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Nos. 08-289 and 08-294 (Consolidated)

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, et al.,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER SUPERINTENDENT

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for Petitioner Superintendent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. The Superintendent Has Standing.

Plaintiffs assert that the Superintendent lacks standing because he purportedly has no policymaking authority over matters covered by the judgment and that such policymaking falls within the ambit of the State Board of Education pursuant to Arizona Revised Statutes ("A.R.S.") §15-251(3) and (5).[1] This is curious since Plaintiffs sued the Superintendent because he "systematically . . . failed and refused to provide fiscal as well as other resources" to provide proper ELL programs and "encouraged" school districts to violate federal law. CR 83, ¶¶ 28 & 29. Indeed, the original 2000 order, which the Superintendent seeks to vacate, was directed against him.[2]

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[1] Plaintiffs also state that perhaps "only the Governor" could have directed an appeal in this case when a conflict exists among executive officers. Plaintiffs' Br. 22. Indeed, Arizona's current governor, the Honorable Janice Brewer, instructed the Attorney General of Arizona to join in the positions advanced by both the Superintendent and the Intervenor-Defendants. *See* Addendum A (Governor's letter). By plaintiffs' logic, this Court should ignore the Respondent brief filed by the Arizona Attorney General, purportedly representing the interests of the "State," given the instruction by the Governor that the State be aligned with Petitioners, and treat the Superintendent's brief as that of the State.

[2] In the Second Appeal, the Ninth Circuit held the Superintendent has standing because he supervises Arizona's educational system, has a vital stake in funding issues that affect the programs he oversees, and the original 2000 order, which he

(Continued on following page)

The Superintendent was elected to supervise the public school system. Unlike the Board of Education, whose members are appointed by the Governor, the Superintendent is elected and directly responsible to the voters of the State of Arizona. *See* Ariz. Const. art. V, §1. One of the critical responsibilities of the Superintendent is to "superintend" the schools of Arizona and that is separate and apart from any powers given to the Board of Education. A.R.S. §15-251(1).

When dealing with ELL issues, the Superintendent has broad and explicit authority. In all of the following examples, the Superintendent makes policy independently and without the supervision or oversight of the Board. The Superintendent is solely responsible for the identification and assessment of ELL students. A.R.S. §15-756(A), (B), (C). The Superintendent, not the Board, administers and distributes monies from the structured English immersion fund. A.R.S. §15-756.04. The Superintendent is solely responsible for securing "the maximum amount of federal funding" for ELL programs. A.R.S. §15-756.04(D). The Superintendent also has exclusive powers in determining the English language proficiency and reclassification of ELL students. A.R.S. §15-756.05. The Superintendent, not the Board, prescribes how ELL students are to be reevaluated once they exit ELL programs. A.R.S. §15-756.06. The Superintendent, and not the Board, develops

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seeks to lift, found him to be in violation of the EEOA. App. 53-55.

guidelines to ensure compliance by schools with federal and state laws regarding ELL students. A.R.S. §15-756.07. Further, it is the Superintendent who "direct[s] the office of English language acquisition services" and assesses ELL programs for "programmatic effectiveness." A.R.S. §15-756.08. The Superintendent, through the Arizona Department of Education ("ADE"), also decides whether a school district complies with federal or state laws. A.R.S. §15-756(C). The Superintendent, not the Board, has sole authority to distribute monies for ELL students from the compensatory instruction fund. A.R.S. §15-756.11. By virtue of these sweeping powers over ELL issues, the Superintendent – more than any other executive officer or board – has a vital stake in the outcome of this lawsuit. Moreover, the orders of the District Court, in large part, have not only been directed at the Superintendent, but they also challenge his professional judgment that program compliance with federal law has been achieved.

A defendant has standing to appeal so long as he has a "direct stake in the outcome" of the appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Indeed, any co-defendant has an absolute right to challenge an injunction that adversely affects his interest. *United States v. City of Miami*, 664 F.2d 435, 445 (5th Cir. 1981). Standing to appeal further exists when a party cannot fulfill the functions of his office. *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005). Finally, a party "has standing to object to orders specifically directing [him] to take or refrain

from taking action." *United States v. Sweeney*, 914 F.2d 1260, 1263 (9th Cir. 1990).

II. The Lower Courts Failed to Identify a Continuing Violation of Federal Law.

When the original 2000 order was entered, NUSD employed a bilingual and English as a second language (bilingual/ESL) program of ELL instruction. That program was broken. The District Court found that at least part of the problem was funding. Hiring dual language teachers was difficult. Because of Proposition 203, NUSD turned to structured English immersion strategies (SEI) where programming was only offered in English. Therefore, it no longer needed additional funding to hire bilingual teachers to implement an effective ELL program. The record shows the SEI program was effective at current funding levels. Yet, Plaintiffs persuaded the lower courts to continue focusing, not on whether "appropriate action" was being taken to teach English, but on State earmarked funding remedies even though there was no longer a violation of the EEOA. That misguided approach fails to consider the fundamental issue by which EEOA §1703(f) compliance is to be determined – has "appropriate action" been taken?

A. The Lower Courts Wrongly Measured Compliance in Terms of Funding, Not Programming.

The most important point made at the 2007 Rule 60(b)(5) hearing was that, due to changed circumstances

since 2000, NUSD complied with the EEOA. *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981), held that the touchstone for addressing "appropriate action" compliance with EEOA §1703(f) is whether ELL programs are reasonably calculated to permit ELL students to overcome their language barriers. NUSD met the *Castaneda* test in 2007. The evidence was overwhelming that this was the case because of different ELL theories of instruction, deep state and federal involvement, better management, and increased funding. Neither the District Court, the Ninth Circuit, nor the Plaintiffs in their brief claim that NUSD failed to afford its ELL students a reasonable opportunity to learn English. Their main concern was not with programming, but with remedial orders requiring earmarked funding to pay for the incremental costs of ELL programming.

The District Court's March 22, 2007 order ignored specific evidence that the educational deficiencies identified in the original 2000 order (bilingual/ESL) had been addressed and remedied under a different ELL theory of instruction (SEI). Although the District Court admitted that NUSD's ELL program had "substantially" improved since 2000 and that the Superintendent provided "much more" in terms of "standards" and "oversight," it nevertheless vaguely stated, *without citing any supporting facts*, that "NUSD's success is fleeting at best, particularly as it pertains to NUSD's high school students." The District Court's order did not otherwise address program compliance.

Instead, the District Court erroneously accepted Plaintiffs' position that the case was about earmarked funding. The District Court's sole focus was the propriety of the funding mechanisms of the yet to be implemented House Bill 2064. The Rule 60(b)(5) motion was denied, not because of the inadequacy of NUSD's ELL program, but because "HB 2064 fails to satisfy this Court's judgment because it does not provide funding for ELL instruction . . . that is rationally related to the cost of that instruction." App. 99, 113.

The Ninth Circuit trod the same path as the District Court. It changed the *Castaneda* test of program sufficiency to one of "resource" sufficiency. App. 8. It also defined compliance with the EEOA not in terms of programs, but in terms of earmarked funding. The Ninth Circuit specifically found that it would not "absolve the State from providing adequate ELL incremental funding." It concluded that in weighing Rule 60(b)(5) relief, "incremental funding is what matters for EEOA purposes." App. 70. As a consequence, no matter how effective an ELL program might be, Arizona could never attain relief from the original 2000 order until state earmarked funds covered the incremental cost of ELL programs. In short, compliance was measured solely in terms of funding.

The Ninth Circuit also scoured the record to tarnish NUSD's ELL programs. Those efforts sought support for the notion that "incremental funding is what matters for EEOA purposes." The Ninth Circuit

never claimed, however, that these purported blemishes undercut the Superintendent's argument that NUSD instituted an integrated system of ELL education that provided programs reasonably calculated to overcome language barriers. Those blemishes recited are grossly exaggerated and do not detract from the fact that NUSD, in the words of Plaintiffs' own witness, Dr. Zamudio, conducts effective ELL programs, and meets federal ELL requirements. Tr.Day6, pp.84, 98.

"[T]he scope of federal relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory language only . . . federal courts must be sensitive to the need for modification when circumstances change." *Clarke v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). This principle is echoed in *Glover v. Johnson*, 138 F.3d 229, 242 (6th Cir. 1998): "terminating judicial oversight is an objective to be affirmatively strived for, not simply an event that we welcome if it happens to occur." Involvement of federal courts to rectify violations of federal law should be seen as "temporary measures" that should end once compliance is achieved so control promptly may be returned to "state and local authorities." *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). Remedial orders "are not intended to operate in perpetuity." *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991).

Had the District Court and the Ninth Circuit followed the foregoing principles, they would have determined first and foremost whether in 2007,

NUSD conducted a program that complied with §1703(f). They failed to do so because they improperly followed Plaintiffs' false direction found in their answering brief (p. 33) filed in the Ninth Circuit in the Second Appeal:

> In determining whether the judgment has been satisfied, the issue is not whether the needs of ELL students have been met but whether the State has established a funding system for ELL students and programs that is not arbitrary.

B. Plaintiffs Continue to Improperly Frame the Issue of Compliance in Terms of Funding.

Plaintiffs assert that the District Court followed the federalism principles enunciated in cases such as *Milliken v. Bradley*, 433 U.S. 267, 288-89 (1977), and *Missouri v. Jenkins*, because the District Court did not direct the defendants to employ a particular program or funding scheme. *See* Plaintiffs' Br. 23-29. This contention is misplaced. The basic aim of the Plaintiffs' lawsuit was compliance with EEOA §1703(f) so that effective ELL programs were instituted. Had NUSD's old bilingual/ESL program been effective in 2000, its funding would not have been addressed.

Plaintiffs narrowly frame the issue as all about state earmarked funding and from this they assert

that the District Court's remedial orders were carefully calibrated. Plaintiffs fail to recognize that in 2007, under a different theory of language instruction and with different programming, NUSD conducted effective ELL programs. Once compliance with §1703(f) was demonstrated, there was no need to require the state to perform studies and create special streams of income. Remedies must be connected to a violation of federal law. *Missouri v. Jenkins*, 515 U.S. at 88.

The *Glover* Court, in remanding for a Rule 60(b)(5) hearing, noted that the crucial inquiry for a district court to consider was whether the prior violations of federal law "continue to exist today" and not to fight over remedial issues. 138 F.3d at 242. The Sixth Circuit succinctly stated the principle as follows:

> All involved in this litigation must bear in mind that the details of the district court's remedial plans and orders are not ends in themselves; they are only a means to an end. If the defendants can demonstrate that they have remedied the constitutional violations found in 1979, even without compliance with the details of previous orders or plans, they must be permitted to do so. And if they do so, federal court oversight must terminate.

Id. at 243.

Contrary to Plaintiffs' assertion, requiring a state to tax its citizens for earmarked funding when there is no longer a violation of federal law confuses means with ends and constitutes funding for the sake of

funding. Inquiries into the source of funding cease to matter when a program exists that is reasonably calculated to permit ELL students to overcome their language barriers.

III. Rule 60(b)(5) Relief Was Justified Because Fundamental Changes in ELL Programming and Funding Show that Appropriate Action Was Taken.

A. The General Themes of Changed Circumstances and Program Compliance Have Not Been Challenged.

Plaintiffs make no challenge to the fundamental basis of the original 2000 order. Funding through the 1990s was rooted in inertia and this prevented NUSD from implementing its old bilingual/ESL theory of instruction because of the inability to hire specially trained teachers and the general inadequacies of other elements of ELL instruction such as insufficient instructional materials and intervention programs. Under this old program, large numbers of ELL students obtained no English language development.

Further, Plaintiffs do not challenge the effectiveness of the new SEI strategy adopted after the enactment of Proposition 203. Nor do they dispute the fact that since NUSD adopted such SEI strategies, its ELL students are now being consistently taught English for a minimum of two hours a day; the instruction takes place in small group settings; those students are taught by trained teachers who have

acquired SEI endorsements; there are plentiful instructional materials; adequate intervention programs are in place; and, most importantly, unlike 2000, a large number of NUSD's students are learning English and becoming proficient. As noted in the Superintendent's opening brief, these massive changes did not take place overnight. They were wrought through deepened involvement of the federal government under NCLB, significant structural changes at the state level, general funding increases, increased funding devoted solely to ELL purposes, and substantially better local management and use of resources. There is now a coherent system in place reasonably calculated to teach English so ELL students may overcome language barriers (hence, EEOA compliance). This is completely different from the situation in 2000 when there was a theory of bilingual/ESL language instruction, but no system to effectively implement that theory.

Though these main themes have not been controverted, Plaintiffs now claim that blemishes exist at NUSD. The District Court made ***no*** finding regarding any of these purported blemishes, did not deny relief on the basis of any of these items, and explicitly rested its decision on the funding mechanism of HB 2064. When judged in the context of the overall evidence, these items do not detract from the fact that the current ELL program complies with §1703(f).

B. Alleged Problems with NUSD's ELL Program Are Unsupported by the Record and Do Not Warrant Continued Federal Oversight.

i. The Focus on NUSD Is Proper.

Plaintiffs erroneously argue that the Superintendent's focus on Nogales is misplaced. Plaintiffs' Br. 38. "A class must be clearly defined and only members can be legally bound by settlements or judgments in the class action." *In re School Asbestos Litig.*, 56 F.3d 515, 519 (3d Cir. 1995). The District Court ordered that this action be "maintained as a class action" and "that the class shall consist of all minority at risk and limited English proficient children now or hereafter enrolled in the Nogales Unified School District." CR 105. The class was never expanded. Liability under the original 2000 order rested solely on evidence about NUSD's non-functioning bilingual/ESL program. The class never involved students from any other school district. Because the District Court looked solely at the NUSD program in making its findings in the original 2000 order, the Superintendent, in the Rule 60(b)(5) hearing, properly concentrated his evidence to show that circumstances in NUSD had changed.

The Superintendent agrees that any *remedy* would have statewide application because of the "general and uniform" provision of the Arizona Constitution. *Liability* in this case, however, is and always was measured by the ELL program at NUSD. The original 2000 order was based solely on evidence

concerning NUSD. If Plaintiffs believed that the focus of liability was to be measured by other school districts, they should have added other parties to the complaint.

ii. Reclassification Rates at NUSD Show Positive Results.

Plaintiffs now incorrectly claim that Dr. Zamudio's conclusory statement that it takes NUSD four to five years to reclassify its ELL students is a blemish and aver that A.R.S. §15-752 requires ELL students to become English proficient in one year. Plaintiffs' Br. 39. There is no Arizona statute requiring an ELL student to become proficient within any period. A.R.S. §15-752 (Proposition 203) simply suggests that ELL students be educated through SEI strategies "not normally intended to exceed one year."[3]

Moreover, there is no correlation between the pace of ELL reclassification and funding. For example, Cathy Rivera, who presided over the ELL program in the Scottsdale Unified School District, testified that it took the average Scottsdale ELL student over five years to be reclassified. CR 611 (Dep. p. 66). Yet, Scottsdale spends twice as much money on its ELL program as NUSD, groups its beginner ELL students in class size ratios of 10:1,

[3] HB 2064 seeks to quicken the pace of ELL proficiency and all beginning ELL students must undergo a minimum of four hours per day of English language instruction. App. 288.

and provides four hours of English language development daily to all ELL students.[4] *Id.* pp. 33, 65-66 & Ex.74.

That one school district or particular school reclassifies its students faster than another is beside the point. There are many explanations why that may be the case. The essential focus should be on whether the school district "takes appropriate action" so that ELL students can overcome their language deficiencies. On the basis of the evidence produced at the Rule 60(b)(5) hearing, NUSD took "appropriate action" when large percentages of its ELL students at all grade levels improved their English language proficiency and became English proficient. App. 312.

iii. Graduation Rates Provide No Help in Determining "Appropriate Action."

Plaintiffs cite statistics regarding graduation rates and even go outside the record to assert that the graduation rate for NUSD's ELL students is 66%. Plaintiffs' Br. 39. These statistics are meaningless. There was no link shown between graduation rates

[4] Scottsdale Unified School District, Tucson Unified School District, and other school districts have significantly more funding available than school districts such as NUSD because they can impose taxes under A.R.S. §15-910(G) to fund the costs of remedying any court order of the United States or agreement with the Office of Civil Rights dealing with racial discrimination.

and increased funding. There was no showing that program deficiencies caused or affected graduation rates. These statistics are no help in deciding whether "appropriate action" has been taken.

iv. ELL Students' AIMS Test Scores Are Irrelevant.

Plaintiffs incorrectly claim that performance data by ELL students on Arizona's AIMS test indicate program deficiencies. Plaintiffs' Br. 39-42. ELL students, by definition, are not proficient in English. AIMS tests are given in English. It is obvious that ELL students will not pass AIMS until they become proficient. Moreover, students' performance on standardized tests are influenced by a variety of factors beyond the control of a given school district. How well current ELL students achieve on AIMS is irrelevant to the question of "appropriate action." A more relevant question is how well reclassified (former) ELL students compare to native English speaking students on AIMS testing. That data demonstrates that NUSD's reclassified students perform just as well if not better on AIMS as native English speaking students. App. 310.

v. High School Performance Data Cited by Plaintiffs Is Misleading.

ADE conducted a study to determine how well students classified as ELL in 2003 performed on AIMS in 2005 and then ranked the schools based on their performance. Tr.Day5, p.130. The purpose of the

study was to determine what successful methods of instruction schools used, so those methods could be spread to other schools. Tr.Day5, pp.130-32; Tr.Day3, p.180. The study showed that four of the top ten schools in the state were in Nogales. No other district approached these results. Tr.Day5, pp.131-33. What was remarkable was that the pass rate at these four elementary schools on AIMS exceeded the average pass rate of 66% for all students (ELL and non-ELL) in Arizona. One school, Coronado de Vasquez, had a pass rate of 77.86%. Tr.Day5, p.134; TE214. This study caused ADE to form a task force in early 2006 to determine what strategies NUSD employed. Those successful strategies are well documented and are employed at all of NUSD's schools, including the high schools. Tr.Day5, p.133; Tr.Day3, pp.47, 50-51, TE214.

Plaintiffs seek to downplay the significance of these results by pointing out that NUSD high schools did not perform as well in the study. Plaintiffs' Br. 40. But as Dr. Zamudio pointed out during trial, older students tend to have difficulty in learning a new language and catching up academically. Tr.Day6, pp.51-53, 128. Kelt Cooper, NUSD's superintendent from 2000 to 2005, also testified that scores decrease at higher grade levels. Tr.Day4, p.55. He told the school board that his managerial reforms would therefore first provide "radical improvements" at the elementary schools and that there would be a "feeder effect," over time, at the middle and high schools. Tr.Day4, pp.55-57. He also described gangs and "endemic" drug problems at NUSD's high schools as

major factors impacting NUSD high school students' performance on AIMS. Tr.Day4, pp.59-60.

For these reasons, courts have discouraged reliance on test scores as a means of evaluating whether discrimination exists. "Using achievement test scores as a measure [of discrimination] is deeply problematic." *United States v. City of Yonkers*, 197 F.3d 41, 54 (2d Cir. 1999). "Neither the remedial obligations, this Court, nor the Supreme Court require the Defendants to guarantee success in proficiency testing; success is strongly influenced by many factors beyond the control of the school districts." *Reed v. Rhodes*, 1 F. Supp. 2d 705, 738 (N.D. Ohio 1998).

No one ever challenged the resources and strategies in place at the high schools. No one ever claimed that the high schools failed to take "appropriate action." Indeed, there was no basis for such a statement when the evidence demonstrated that significant resources and effective programs were devoted to NUSD's ELL high school students and that they, in fact, were learning English and becoming proficient. Tr.Day6, pp.21, 24, 28, 30, 54, 62; TE214; App. 312.

vi. There Are Sufficient Qualified Teachers.

Plaintiffs' claim that NUSD experiences a shortage of qualified teachers is contrary to the record. Plaintiffs' Br. 42. NUSD's teachers, on the average, are not only experienced with 8-9 years of teaching,

but 90% are highly qualified under NCLB parameters. Tr.Day6, pp.45, 105, 108. Though the remaining 10% of staff is comprised of long term substitute and emergency certified teachers, some of these teachers are perfectly qualified to teach and are on path to obtain their Arizona certification. Tr.Day6, p.104. More importantly, there was no evidence that any of these emergency and substitute teachers had any involvement with NUSD's ELL programs. Tr.Day6, p.45.

Witnesses lauded the teachers at NUSD. Irene Moreno of ADE stated that "it would be an honor to teach and work with the majority of these teachers." Tr.Day1, p.175. Rosalie Porter, a national expert on ELL issues commented that NUSD's teachers were "impressive." Kelt Cooper stated that NUSD had "very sharp" teachers and administrators. Tr.Day1, p.175; Tr.Day4, p.62.

Plaintiffs fail to focus on the appropriate issue. In 2000, NUSD suffered a systematic breakdown in its ELL programs because it could not hire bilingual/ESL endorsed teachers to teach the theory of instruction that NUSD had then adopted. But by 2007, all of NUSD's ELL students were placed in classrooms in which English language development was taught, and the state ensured, through SEI endorsements, that teachers in those classrooms were properly trained. Indeed, the District Court gave its imprimatur to these endorsements stating that they provide teachers with "the opportunity to develop the necessary skills to appropriately address ELL students'

unique needs and allow them to participate equally in their schools' instructional programs." CR 292. The Rule 60(b)(5) hearing showed that the systemic problem in finding qualified teachers no longer existed.

vii. There Is Sufficient Tutoring.

Plaintiffs further claim that "Nogales [cannot] afford additional tutors." Plaintiffs' Br. 42. Yet, NUSD failed to apply for state tutoring money provided under A.R.S. §15-809, Arizona's AIMS Intervention/Dropout Program, and only spent $8,875.00 of $31,000.00 allocated to it under A.R.S. §15-241(Q), Arizona's Underperforming/Failing School Fund. TE223, p.10; Tr.Day2, p.2. ADE's task force report noted that one of the hallmarks of success by NUSD is that it provides intervention measures to benefit ELL students during the school day, offers remedial summer school programs, and provides tutoring before, during, and after school. TE214; Tr.Day1, pp.163-69. Dr. Zamudio confirmed that these tutoring strategies contributed to the "success" of NUSD's ELL program. Tr.Day6, p.28.

viii. Teacher Aides Are Not Critical.

Plaintiffs claim a need for aides, but neglect to state that there is a professional disagreement among educators as to their efficacy. Plaintiffs' Br. 42. Under Kelt Cooper's tenure, NUSD consciously eliminated aides because they barely spoke English, some did

not even have a GED, and they inhibited teacher interaction with students. Tr.Day3, p.223; Tr.Day4, pp.11, 12, 14. Dr. Zamudio took a different view and wanted to hire aides. Tr.Day6, p.47. Zamudio, however, acknowledged that reasonable professionals differ on this issue. Tr.Day6, p.155. The most important point is that NUSD took "appropriate action" without the use of aides. The federal judiciary should not be drawn into this pedagogical debate. As long as professional judgment is used "it is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

ix. Class Sizes Are Not an Issue.

Plaintiffs assert that the average class size at NUSD remains high. Plaintiffs' Br. 42. Class size has not been a problem since Kelt Cooper commenced enforcing NUSD's attendance policies and set realistic class size goals.

Dr. Zamudio concurred. He stated that the high schools maintain class sizes at 16-17 for ELL students, that middle school ELL students separately receive "small group" instruction with intense focus on English language development, and that elementary school ELL students also receive small group instruction. Tr.Day6, pp.20-23. Nogales, like any other school district, transfers teachers from one school to another to properly balance classroom ratios. Dr. Zamudio testified that in 2007, no class

exceeded 29 and, in his words, "we are managing our classroom size well." Tr.Day6, pp.14-15.

The 2006 task force determined that every elementary school had an average class size in the low 20s except for Vasquez de Coronado with a class size of 28. One middle school's class size was 26 and the other was 31. Nogales High School achieved class sizes of 22 and the alternative high school maintained a class size of 20. These class sizes are quite reasonable. Rosalie Porter, a nationally acclaimed expert, stated that she has been in thousands of ELL classrooms throughout the country with class sizes in the 20s and excellent ELL instruction took place. Tr.Day1, pp.104-05.

Conclusions about class sizes can also be misleading. For example, Vasquez de Coronado, with an average class size of 28, posted the best test scores in NUSD, ranked third in the state, and its ELL students far exceeded the state average. TE214. ELL students at Desert Shadows Middle School, with an average class size of 31, posted scores in the top 25% of the state and substantially exceeded the other middle school at NUSD with a classroom size of 26. TE214.

Plaintiffs cannot seriously contend that the foregoing class sizes constitute "inappropriate action" when their own witness states the opposite. Instead, like the Ninth Circuit, they claim that NUSD's class sizes do not match the 15:1 ratio put forward by ADE as a suggestion to school districts. The record

disclosed the origin of this ratio as an aspirational compromise number. Tr.Day3, pp.143, 190. Even Dr. Zamudio understood this ratio to be unrealistic. Tr.Day6, p.80. Further, this "ideal" target never had any effect because it was subsumed by the class size determinations to be made by the task force created by HB 2064. Tr.Day3, p.190. Though the task force models were in the process of being created during the Rule 60(b)(5) hearing in 2007, Plaintiffs go outside the evidentiary record and refer to the completed models that now govern Arizona's ELL program. They claim that class sizes at NUSD in 2007, in certain cases, do not match the class size limits of the new task force models. This is misleading. First, this new task force model requires ELL students to be grouped by proficiency ability in classes not to exceed 23 for pre-emergent/emergent students and 28 for basic/intermediate students. Second, NUSD is in compliance with these class sizes for the current year.

Hypothetical class size targets were not the issues posed to the District Court in 2007. At that time, the issue was whether NUSD achieved reasonable class sizes so that it could deliver effective ELL programs. The evidence shows that it did.

x. All Sources of Funding Should Be Considered.

Plaintiffs claim that only earmarked funding sources should be considered. This is consistent with the Superintendent's complaint that the lower courts

treated §1703(f) as a funding statute, rather than a performance statute.

Plaintiffs claim, for example, that total override money of $1,674,000.00 should not count because NUSD internally earmarks only $43.43 per student of this money for ELL students. They then claim that the override may be temporary even though it has been in effect for every single year since the original 2000 order was entered. Plaintiffs fail to mention other sources of funding that have added hundreds of millions of dollars to public education. It is nonsense to claim that all new sources of funding should not be considered in weighing the propriety of Rule 60(b)(5) relief.[5] NUSD receives base level funding, Proposition 301 funds, override funds, and other monies. TE225, 231. Its school board has total discretion on how to use those funds. The new funding increases allowed NUSD's maintenance and operations budget to grow from $22,195,385.00 in 2000 to $28,956,939.00 in 2006 while the number of students declined. TE225. NUSD, in 2007, mounted effective ELL programs with this money and did not run afoul of any federal law.

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[5] In fact, plaintiffs acknowledge (*see* Plaintiffs' Br. 40) that because NUSD "is composed almost entirely of ELL or reclassified-ELL students, it is difficult to draw any sharp distinction between ELL and non-ELL students." By this logic, no "sharp distinction" should be made between sources of funding for ELL and non-ELL students because all funding sources will inevitably benefit all ELL students who, according to the Plaintiffs, comprise almost the entire school district.

The rising tide of aggregate increased funding lifts all boats. When those increases permit a school district to pay higher salaries, hire more teachers, obtain plentiful instructional materials, obtain more tutoring, and lower class sizes, all students benefit, ELL and non-ELL. Plaintiffs forget that ELL students are entitled to a share of base level funds and any other funding provided by Arizona's finance system. Further, the notion that diverting base level funds has hurt NUSD's non-ELL programming has no support in the record. To the contrary, Dr. Zamudio extolled the progress of NUSD's mainstream students and noted that they are far exceeding state averages on Arizona's AIMS test. TE221.

Plaintiffs suggest that moving funding from regular education to ELL programming would be "insensitive." Even if true, that hardly constitutes a violation of federal law.[6] There is nothing in this record to indicate that the regular programming at NUSD has suffered.

xi. Program Compliance, Not Perfection, Is All that Is Required.

In determining whether a school district's education plan for ELL students constituted "appropriate action," the *Castaneda* court found that Congress

[6] "The commission of a federal judge is not a general assignment to go about doing good." *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986).

intended to balance two competing interests: the desire "to leave state and local educational authorities a substantial amount of latitude in choosing programs and techniques they would use to meet their obligations under EEOA" and the need to "insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." 648 F.2d at 1007. But "the law does not require perfection." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518-19 (D. Colo. 1983). "Are things perfect? No, and they never will be." *Citizens v. Schafer*, 872 F. Supp. 689, 709 (D.N.D. 1995), *reversed in part*, 83 F.3d 1008 (8th Cir. 1996). What the law requires is that there be a system in place that ***reasonably*** addresses problems, imperfections, and threatened violations of federal law. *Id.*

Plaintiffs seek additional funding for program enhancements that clearly are unnecessary to redress any existing violation of federal law. Plaintiffs and the Ninth Circuit argue, for example, that the failure of NUSD to attain 15:1 ratios for its ELL students is somehow a deficiency, when there is no evidence that this type of ratio is necessary to conduct effective ELL programs.

Further, the argument of the United States that curing the deficiencies in the original 2000 order is insufficient for Rule 60(b)(5) relief is puzzling, yet symptomatic of the positions advanced in this case. United States Br. 26. Plaintiffs and the United States continue to focus on remedies when the principal

issue properly before the District Court in the Rule 60(b)(5) hearing was program compliance.

Finally, the United States asserts that the state must provide a structure under which school districts can comply with federal law. The Superintendent agrees. Indeed, the District Court complimented ADE for "creating standards, norms and oversight for Arizona's public schools and students with regard to ELL programs." App. 97. Arizona enacted a plethora of statutes that fundamentally altered Arizona's approach to ELL education. The comprehensive nature of state involvement is well documented in the evidentiary record. Thus, Arizona *has* provided an adequate structure under which school districts can comply with the EEOA. For that reason, NUSD now *is* complying with the EEOA.

The notion that to comply with the EEOA, Arizona must tell school districts how they must manage their funding and how they must staff their schools, is beyond anything envisioned by Congress. Indeed, the *Castaneda* court takes a contrary position. The Superintendent is unaware of any case stating that the EEOA requires states to micromanage school districts to ensure systematic compliance.

It was shown at the Rule 60(b)(5) hearing that Arizona instituted a broad structure to ensure effective ELL programming. That structure permitted NUSD to conduct programs that were reasonably calculated to permit ELL students to "overcome language barriers." That is "appropriate action" and all that is required under the EEOA.

xii. Program Compliance Has Been Achieved.

Every single finding in the original 2000 order was upended. In 2007, unlike 2000, there were adequate classrooms, appropriate intervention programs and tutoring, reasonably sized classrooms, plentiful instructional materials, and, most importantly, trained and endorsed teachers. On top of these major changes, ADE put into place an infrastructure of teacher training, proficiency standards, assessments, monitoring for program effectiveness, and solutions teams to provide technical assistance. This permitted NUSD, at current funding levels in 2007, to provide an effective ELL program. Every witness testified, including Plaintiffs' own witness, that the NUSD program was a success. Indeed, by 2007, unlike 2000, NUSD was providing consistent English language development and its ELL students were overcoming their language barriers in large numbers. No one has ever challenged the Superintendent's core argument that the *Castaneda* test was met because NUSD provided a program reasonably calculated to teach ELL students English so they could participate equally in their schools' academic programs. Superintendent's Opening Brief, pp. 23-30.

IV. House Bill 2064 Is Irrelevant.

The Superintendent argued at the outset of the Rule 60(b)(5) hearing that compliance with §1703(f) was achieved without considering the two-year

funding limit and the federal offsets of HB 2064. The District Court struck down those provisions and they were never implemented. That decision was upheld by the Ninth Circuit. Consequently, those provisions never had any effect on the structural changes in ELL programming that took place and were the subject of the Rule 60(b)(5) hearing. The Superintendent takes no issue with those rulings and their consideration is irrelevant to this appeal. Consequently, Plaintiffs' argument that the funding mechanisms of HB 2064 require denial of Rule 60(b)(5) relief has no merit.

V. The Parties Agree that NCLB Supplements, but Does Not Displace the EEOA.

The Superintendent has never argued that NCLB repealed or replaced §1703(f). Since the two statutes involve the same subject and pursue the same objectives, they should be read together and consistently. Both the Plaintiffs and the United States concur that NCLB supplements the EEOA. Plaintiffs' Br. 5; United States Br. 24. The parties differ in the application of these general principles to the two statutes.

Both the United States and the Plaintiffs contend that the approval of a plan by the United States Department of Education ("DOE") does not reflect any judgment about the adequacy of a state's ELL requirements. Plaintiffs' Br. 5; Unites States Br. 20. This is belied by both statute and the record. A state

must submit to DOE and institute English language proficiency standards for ELL programs statewide and those standards must be aligned to the state's academic English standards. 20 U.S.C. §6823(b)(2). These standards are massive. TE202. They provide the curricular foundation for every teacher in Arizona and allow the state and school districts to monitor and assess the progress of ELL students. Tr.Day1, p.43. When ELL students master the higher level of these standards, they are working at the same level as regular English speaking students in the 12th grade. Tr.Day1, p.39. To ensure that these standards met federal requirements, Arizona hired a nationally known expert to develop them. Tr.Day1, p.43.

NCLB also requires states to annually assess ELL students to ensure that they are meeting these proficiency standards. 20 U.S.C. §6823(b)(3)(D). Arizona initially required all school districts to use an assessment tool called the Stanford English Language Proficiency test ("SELP") because it was closely aligned to the proficiency standards. Tr.Day1, p.46. However, DOE rejected SELP and required Arizona to adopt Azella, a different assessment tool, because Azella was even more closely aligned to Arizona's proficiency standards. Tr.Day1, p.50. Contrary to the position of the United States, DOE is not an inert agency with no involvement in state programming.

Further, NCLB requires states to hold school districts accountable for the progress of their ELL students and requires specific percentages of ELL students to improve and attain proficiency on these

assessment tests so as to meet their AMAOs. 20 U.S.C. §6842. Those percentages are specifically approved by DOE. Tr.Day1, p.160. School districts must also provide detailed plans on how they will assure that their ELL students will achieve progress on their AMAOs. 20 U.S.C. §6826.

A state plan must set forth how it will establish proficiency standards tied to its academic English standards. 20 U.S.C. §6823. DOE, after using a "peer review" process, will approve the plan once it meets statutory requirements. 20 U.S.C. §6283(c).

In addition, the state must hold school districts accountable if they fail to meet their AMAOs. 20 U.S.C. §6842(b). For any school district that does not achieve its AMAOs for two years, the state must require an improvement plan and provide technical assistance. 20 U.S.C. §6842(b)(2)(3). More drastic steps will occur if such failure continues for four consecutive years. 20 U.S.C. §6842(b)(4).

Arizona has put together solutions teams to comply with NCLB and provide technical assistance to those school districts which fail to meet their AMAOs. Tr.Day5, pp.146-147; A.R.S. §15-741. Arizona also continually monitors school district ELL programs and conducts outreach programs to ensure their effectiveness. TE207, TE209. It is true that NCLB specifically gives states and school districts "flexibility" on how best to implement strategies for the teaching of English. 20 U.S.C. §6812(9). This is consistent with *Castaneda*, which determined that

§1703(f) provided states and local agencies with "wide latitude" in implementing ELL programs. However, NCLB constitutes a fully integrated system to ensure that ELL students become proficient.

No one has ever suggested that Arizona's plan and the implementation of that plan fail to comply with either the intent or purpose of NCLB. No one, for example, has indicated that its proficiency standards are not tied to its academic standards. Nor has anyone suggested that Arizona's AMAOs and the target percentage for both improvement and attainment of English proficiency are improper.

In short, Arizona has put together a coherent and integrated system required under NCLB to ensure that its ELL students learn English, become proficient, and do so in lockstep with Arizona's academic standards. It holds school districts accountable for the progress of their ELL students. As a result, NUSD's students, in large number and across the grade spectrum, are now learning English and becoming proficient. It is inconsistent to claim that Arizona is in *systemic violation* of the EEOA (requiring only "appropriate action") when it is clear that Arizona has achieved *systemic compliance* with NCLB.

A. That State Compliance with NCLB Is Voluntary Has No Bearing on the Need to Interpret the EEOA Consistently with It.

The fact that NCLB is voluntary does not affect the requirement that, in exchange for funding, a state must adhere to the accountability requirements of NCLB. Once those requirements have been met and systemic and coherent programs are employed, it matters not whether NCLB is voluntary or mandatory. Further, the Superintendent has never argued that NCLB displaces the private right of action provided for in the EEOA. He urges, instead, that EEOA still can be used to redress *individual* acts of discrimination. But the State should not be liable for a *systemic* violation of the EEOA when it puts into place comprehensive programs approved by DOE and that meet the purposes of NCLB.

B. NCLB, like the EEOA, Requires Positive Results.

Plaintiffs finally argue that the EEOA requires inputs and NCLB does not and that this somehow justifies a departure in the way each statute is interpreted. That is not accurate. NCLB requires proficiency standards, assessments, qualified teachers, testing, and results. Though NCLB does not specifically tell school districts what language theory should be used, what class sizes are appropriate, or how many hours of English language development should be taught, neither does the EEOA under the

Castaneda test. However, "appropriate action" under the EEOA must be undertaken to obtain positive results. Much like the EEOA, NCLB concentrates primarily on positive results. If positive results cannot be obtained under a state plan because a state fails to dedicate appropriate resources, then the DOE is empowered under NCLB to impose appropriate sanctions. However, in 2007, no one suggested that Arizona had not provided resources adequate to implement its plan so as to ensure that its ELL population had real opportunities to learn English. Indeed, the opposite was shown when NUSD's AMAOs demonstrated the overwhelming success of its ELL programs.

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CONCLUSION

Compliance with the "appropriate action" requirement here may be determined as a matter of law. Every witness testified that NUSD conducts an effective ELL program and the District Court never made a finding to the contrary. A requirement of state earmarked funding does not appear in §1703(f). The judgments of the District Court and the Ninth Circuit should be reversed.

Respectfully submitted,

ERIC J. BISTROW,
Counsel of Record
DARYL MANHART
MICHAEL S. DULBERG
MELISSA G. IYER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn, Suite 200
Phoenix, Arizona 85014
phone: 602-274-7611
fax: 602-234-0341

Attorneys for
Petitioner Superintendent

April 10, 2009

APPENDIX A

[SEAL]

STATE OF ARIZONA

JANICE K. BREWER
GOVERNOR

EXECUTIVE OFFICE

March 11, 2009

The Honorable Terry Goddard
Arizona Attorney General
1275 West Washington
Phoenix, Arizona 85007

RE: *Flores v. State of Arizona*, Nos. 08-289 and 08-294

Dear Mr. Goddard:

Your office represents the State of Arizona in *Flores v. Arizona.* It is my understanding that your office has acted at the behest of my predecessor throughout the course of this litigation. I therefore write to clearly establish the position of the State of Arizona in these cases currently pending before the United States Supreme Court.

After carefully reviewing the above cases and the issues currently before the Court, I hereby direct you to file a brief at the Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate.

Further, you are directed to take any and all actions on behalf of the State of Arizona necessary to aid, facilitate and support the positions taken by the Superintendent, the Speaker, and the President in these cases before the Court.

Sincerely,

/s/ Janice K. Brewer
Janice K. Brewer
Governor

cc: The Honorable Thomas C. Horne
The Honorable Bob Burns
The Honorable Kirk Adams

JKB/jk